STATE OF MICHIGAN
IN THE SUPREME COURT

CALEB GRIFFIN,

Plaintiff-Appellant,

v.

SWARTZ AMBULANCE SERVICE,

Defendant-Appellee,

and

SARAH ELIZABETH AURAND,

Defendant.

_____/

Supreme Court No. 159205

Court of Appeals Case No. 340480

Circuit Court Case No. 14-103977-NI

AMICUS CURIAE BRIEF OF MICHIGAN DEFENSE TRIAL COUNSEL, INC.

Miller, Canfield, Paddock and Stone, PLC
Michael C. Simoni (P70042)
840 W. Long Lake Rd., Suite 150
Troy, MI 48098
Attorneys for Amicus Curiae
Michigan Defense Trial Counsel, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Court Rules

Other Authorities

STATEMENT OF QUESTIONS PRESENTED

The MDTC adopts the Statement of Questions Presented as set forth in Defendant's Response to Plaintiff's Application for Leave to Appeal and Defendant's Supplemental Brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT[1]

Like doctors to patients, courts must strive to do no harm to Legislative intent expressed in plain words. Here, the Court of Appeals' majority succeeded.

At issue is whether the Emergency Medical Services Act ("EMSA") limits liability for an ambulance driver's ordinary negligence while driving a patient from the scene of an accident to the hospital. The Legislature limited liability for emergency medical service ("EMS") personnel because it wanted to encourage people to enter that field and not blink on the job for fear that a misstep will lead to a lawsuit. To those ends, MCL 333.20965(1) limits liability for "acts or omissions of [EMS personnel] … while providing services to a patient … that are consistent with the individual's licensure or additional training[.]" *Id*. It seems obvious that an act or omission of a licensed EMS worker while driving a patient in an ambulance happens while she is providing a service to a patient that is consistent with her license or training. It's quintessential emergency service, *the* vital and indispensable act bridging the gap between an accident scene and the hospital. (See Def's Supp Br at 11 fn 9). A common-sense reading of the statute with the

[1] After reasonable investigation, the MDTC believes that (a) no MDTC member who voted either in favor or against preparation of this brief, and no attorney in the law firm or corporation of such a MDTC member, represents a party to this litigation; (b) no MDTC member who is a representative of any party to this litigation participated in the authorship of this brief; and (c) no one other than MDTC, or its members who authored this brief and their law firms or employees, made a direct or indirect financial contribution to the preparation or submission of this brief. Under MCR 7.312(H)(4), MDTC confirms that no counsel for any party authored this brief in whole or in part and that no party contributed money to fund its preparation or submission.

Legislature's well-known intent in mind points to the right result: the driver's liability should be limited. And so the Court of Appeals held.

Plaintiff's application for leave to appeal invites this Court to do harm to the Legislature's intent. According to Plaintiff, MCL 333.20965(1) requires an act or omission to occur "in the treatment of a patient." Driving an ambulance to get the patient from an accident scene to the hospital is not "treatment," says Plaintiff, because the act of driving is not the direct, hands-on "application of medicines, surgery, therapy, etc." (Pl's App Lv at 17). Thus, the emergency medical technician ("EMT") here, whose alleged negligence resulted in a car accident while driving Plaintiff in an ambulance, is not protected under section 20965(1). But Plaintiff gives the phrase "in the treatment of a patient" a meaning its context doesn't bear and, in so doing, elevates "treatment" to a place where it subverts Legislature's intent.

As detailed below, MCL 333.20965(1) does not say that an EMT's act or omission must occur during the direct, hands-on application of medicines, surgery, therapy, etc. to a patient. Section 20965(1) plainly says what acts or omission it covers: those that occur while providing a service to a patient that is consistent with the emergency worker's license or additional training. That is a broad and relatively clear test. Emergency workers know ahead of time that their liability will be limited as long as the service provided to a patient is consistent with their license. Based on the Legislature's goal of encouraging people to become EMS workers and the nature of that work, it makes sense to avoid giving MCL 333.20965(1)'s words meanings that create uncertainty in and narrow the statute's

application. The Court of Appeals reached the right result when it gave "treatment" a broad meaning.

Plaintiff's position, if accepted, cripples the statute. Plaintiff would have this Court skip over more than 100 words in MCL 333.20965(1) and change "treatment" from an adjective describing the area where liability is limited to an adjective further qualifying the "acts or omissions" section 20965(1) covers. Beyond that, Plaintiff's preferred definition of "treatment" just creates more problems by forcing courts and lawyers to determine whether an infinite variety of acts or omissions are sufficiently medical to be "treatment." Confusion, inconsistency and unpredictability will abound. That's bad for EMS workers that have to live with the statute, bad for the lawyers and judges that have to apply it and bad for Michigan residents that need emergency care.

Michigan Defense Trial Counsel urges the Court to deny Plaintiff's application for leave to appeal. Doing so would remind lower Courts that they are duty bound to exercise their independent judgment to give effect to the Legislature's intent. Remaining focused on plain language and Legislative intent, as opposed to the nearest dictionary, will ultimately produce better-reasoned and more-consistent decisions. That, in turn, will assist members of the bar in advising clients in all cases and lead to more predictability and stability in the law.

STATEMENT OF INTEREST OF AMICUS CURIAE

Michigan Defense Trial Counsel ("MDTC") is a statewide association of attorneys whose primary focus is representing defendants in civil proceedings. Established in 1979 to enhance and promote the civil defense bar, the MDTC

accomplishes this by facilitating discourse among, and advancing the knowledge and skills of, defense lawyers to improve the adversary system of justice in Michigan. The MDTC appears as a representative of civil defense attorneys and their clients throughout Michigan, a significant number of whom will be potentially affected by the Court's resolution of the issues presented in this appeal.

STATEMENT OF FACTS

The MDTC adopts the statement of facts set forth in Defendant's Response to Plaintiff's Application for Leave to Appeal and Defendant's Supplemental Brief.

STANDARD OF REVIEW

The MDTC adopts the standard of review set forth in Defendant's Response to Plaintiff's Application for Leave to Appeal and Defendant's Supplemental Brief.

ARGUMENT

I. THE LEGISLATURE'S INTENT AS EXPRESSED IN THE STATUTE'S TEXT IS THE LODESTAR, NOT THE DICTIONARY DEFINITION OF AN ISOLATED WORD; KEEPING THAT IN MIND LEADS TO THE RIGHT RESULT FOR MICHIGAN EMS PERSONNEL, MICHIGAN RESIDENTS, AND MICHIGAN'S BENCH AND BAR.

A. The Court's Job is to Give Effect to the Legislature's Intent.

This case requires the Court to apply a statute and so the analysis must begin with statutory interpretation's first principle: "give effect to the intent of the Legislature" by applying "the language of the statute itself." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). When courts remain faithful to a statute's text and the Legislative purpose the text expresses they "respect the constitutional role of the Legislature as a policy-making branch of government and [avoid] encroaching on this dedicated sphere of constitutional responsibility." *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999). The further a court

strays from the text, the greater the risk that it will "impermissibly substitute its own policy preferences" for those of the Legislature or otherwise undermine the Legislature's intent. *Id.* "When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction[.]" *Id.* The "judicial inquiry is complete," *Barnhart v Sigmon Coal Co*, 534 US 438, 461-62, 122 S Ct 941, 956, 151 L Ed 2d 908 (2002), and all that's left for the court is to apply the statute to the facts of the case.

The courts' task has been complicated in this case because of Plaintiff's near singular focus on the word "treatment" in a statutory section of more than 100 words, which is itself one of more than 50 sections in an act that is but one of the Public Health Code's 100-or-so parts. Zeroing in on a single word has led Plaintiff and the lower courts into a quagmire. In came dictionaries and their varying definitions; out went common sense and the Legislature's known intent. True, when a statute does not define a term, a court may refer to dictionaries as an interpretive aid. *In re Estate of Erwin*, 503 Mich 1, 10; 921 NW2d 308 (2018). But a word's dictionary definition doesn't "conclusively resolve linguistic questions." *Id.* at 20. Courts do not "relinquish [their] duty to exercise [their] best interpretive judgment." *Id.* at 19. They must instead stay true to first principles—giving words their ordinary meaning in their grammatical context and considering statutory sections in light of the broader enactment they are a part of—with the ultimate goal of advancing the Legislature's intent. See *id.* at 21; Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thompson/West 2012) ("*Reading Law*"), App'x A, p 418 ("Because common words typically have more than one meaning, you

must use the context in which a given word appears to determine its aptest, most likely sense.").

The Court of Appeals' majority did not abandon its best interpretive judgment. It fulfilled its constitutional duty and read MCL 333.20965(1) in a way that advances the Legislature's goals.

B. The Text of MCL 333.20965(1), in View of the EMSA as a Whole, Shows that the Legislature did not Intend to Limit Liability for Only Certain Kinds of Acts or Omissions.

The EMSA provides for the uniform regulation of emergency medical services and "limits the liability exposure which may be created by providing such services." *Malcolm v City of East Detroit*, 437 Mich 132, 142; 468 NW2d 479 (1991). It accomplishes this task through, among other things, the creation of medical control authorities for each county in the state, see MCL 333.20918(1), and requiring licenses for the entities and individuals that provide emergency medical services, see, e.g., MCL 333.20920 (licensing ambulance operations) and MCL 333.20950 (licensing emergency medical service personnel).

Individual licenses for EMS personnel correspond to the different levels of life support defined in the EMSA. At the bottom level are medical first responders, whose licenses permit them to provide "medical first response life support as part of a medical first response services or as a driver of an ambulance that provides basic life support services only." MCL 333.20906(8). "Medical first response life support" means "any care a medical first responder is qualified to provide by medical first responder education … or is authorized to provide by the protocols established by the local medical control authority[.]" MCL 333.20906(9). Next in line are EMTs

licensed to provide "basic life support," MCL 333.20904(7), meaning "any care that an [EMT] is qualified to provide by [EMT] education … or is authorized to provide by the protocols established by the local medical control authority," MCL 333.20902(6). Above EMTs, paramedics are licensed to provide "advanced life support," MCL 333.20908(5), which includes "any care a paramedic is qualified to provide by paramedic education … or is authorized to provide by the protocols established by the local medical control authority," MCL 333.20902(1). The EMSA prohibits EMS personnel from providing "life support services at a level that is inconsistent with [their] education, license, and approved medical control authority protocols." MCL 333.20956(1).

In the context of the EMSA's comprehensive licensing scheme, its liability limitation naturally centers on the individual's license and whether the service the individual is providing to a patient is consistent with what that license allows:

> Unless an act or omission is the result of gross negligence or willful misconduct, the *acts or omissions* of a medical first responder, emergency medical technician[,] … [or] paramedic … *while providing services to a patient* outside a hospital … *that are consistent with the individual's licensure or additional training* required by the medical control authority[,] … do not impose liability in the treatment of a patient on those individuals[.]

MCL 333.20965(1) (emphasis added). The Legislature thus chose not to limit liability only for certain categories of activities or require a fact-intensive or hyper-technical analysis. It instead opted for a relatively bright-line test based on relatively objective facts: when an act or omission occurred, was the service being provided to the patient consistent with the level of life support services the EMSA's licensing scheme permitted the individual to provide? See *id.*; MCL 333.20956(1)

(prohibiting services inconsistent with the individual's level of license or training). If so, the act or omission does not impose liability in the treatment of the patient. Treatment, in that context, is used in its broad sense.

C. The Statute's Plain Text Demonstrates that "Treatment" Means the Overall Handling or Care of a Patient and that MCL 333.20965(1) Applies to Driving a Patient in an Ambulance.

The parties do not dispute that Defendant's employee was a properly licensed EMT providing services to a patient when the accident in this case happened. There is also no dispute that driving an ambulance to get a patient from an accident scene to a hospital is consistent with what an EMT's license allows her to do. So, under MCL 333.20965(1), the EMT's acts or omissions must amount to gross negligence or willful misconduct before the EMT can be held legally responsible for resulting harm to the patient.

Even so, Plaintiff argues still more is needed for the EMSA's liability limitation to kick in. According to Plaintiff, the EMT's act or omission must occur while the EMT is directly applying "medicines, surgery, therapy, etc." (See Pl's App Lv at 17). Plaintiff's reformulation of MCL 333.20965(1) isn't consistent with the statute's plain text and grammatical structure. The statute doesn't say that the EMT must be providing treatment to a patient, let alone *medical* treatment. In MCL 333.20965(1), 108 words separate "acts or omissions" from "in the treatment of a patient." The word "treatment" must "be given the meaning that proper grammar and usage would assign [it]." *Reading Law*, *supra*, § 17, p 140. The word's meaning is distorted when more than 100 words are replaced with ellipses and "in the

treatment of a patient" is juxtaposed with "acts or omissions." In truth, "treatment" has nothing to do with the specific act or omission at issue.[2]

In MCL 333.20965(1), the word "treatment" is part of the prepositional phrase "in the treatment of" that acts as an adjective modifying the noun "liability." As such, the phrase "in the treatment of a patient" is simply used to describe the area where the statute limits legal responsibility to gross negligence or willful misconduct—the EMT's relationship with and corresponding obligations toward the patient. It does not describe or characterize the "acts or omissions" of EMS personnel referenced in MCL 333.20965(1). So it should not be defined or operate in a way that would require those "acts and omissions" to fit in a specific category. More broadly, treatment means "the manner in which someone behaves toward or deals with someone or something," *The New Oxford American Dictionary* (2d ed 2005), p 1794, or "conduct or behavior towards another party," *Webster's Third New International Dictionary* (1986), p 2435. These more inclusive definitions are a better fit.

---

[2] The court of appeals' decision in *Doe v Doe I*, unpublished per curiam opinion of the Court of Appeals, issued Sept 17, 2009 (Docket No 285655) (Exhibit A), appears to be the source of confusion surrounding "treatment." The reason is that the *Doe* court juxtaposed the words "in the treatment of" with "acts or omissions," thus giving the impression that the word "treatment" modified "acts or omissions." The panel in *Lee v Dowagiac Volunteer Fire Dep't Ambulance Serv, Inc*, unpublished per curiam opinion of the Court of Appeals, issued June 10, 2010 (Docket No 289605) (Exhibit B), which included the two judges forming the majority in *Doe*, did the same thing. The *Doe* and *Lee* courts nevertheless reached the right results. *Doe* held that section 20965(1) did not limit liability for sexual assault—that is, willful misconduct. On the other hand, *Lee* held that section 20965(1) limited liability for negligence when transferring a patient on a cot—that is, a service consistent with EMS licensure or additional training.

The Court of Appeals got this exactly right. "In this context, the term 'treatment' can reasonably be construed as including the safe and timely transport of the patient to the hospital to receive medical care." (COA Slip Op at 4). That conclusion makes perfect sense when MCL 333.20965(1) is read as a whole. Safe and timely transport of the patient is undoubtedly a service to a patient consistent with an EMT's licensure or additional training.[3] Transport is an inseparable part of the ambulance service. MCL 333.20902(4) (defining "ambulance" as "a motor vehicle … that is primarily used or designated as available *to provide transportation* and basic life support, limited advanced life support, or advanced life support"). A vehicle isn't an ambulance unless it transports a patient, see *id*.; it doesn't transport a patient unless it has a driver. Driving the ambulance to get a patient to the hospital therefore inherently falls within the area where "the immunity afforded by MCL 333.20965(1) applies." (COA Slip Op at 4). When "treatment" is read in its proper grammatical context as describing the general area where liability is limited—not as an additional adjective for "acts or omissions"—it is plain that the Court of Appeals correctly gave "treatment" its broad sense: the overall "handling of a patient … by first responders acting within the scope of their duties and training as first responders." (COA Slip Op at 4).

That result is precisely what the Legislature intended when it enacted MCL 333.20965(1); it should not be lost in the weeds of dictionary definitions. In limiting

[3] Indeed, individuals operating a licensed life support vehicle in emergency and patient transport situations must complete a vehicle operation education and competency assessment. Mich Admin Code, R 325.22132(m).

liability, the Legislature had two aims: (1) "diminish[ing] an impediment that discourages citizens from joining the EMS profession," *Jennings v Southwood*, 446 Mich 125, 134; 521 NW2d 230 (1994); and (2) advancing the public good by removing the concern that threatened liability would, as the United States Supreme Court put it when discussing qualified immunity, "'dampen the ardor of all but the most resolute [individuals] … in the unflinching discharge of their duties,'" *Harlow v Fitzgerald*, 457 US 800, 814; 102 S Ct 2727; 73 L Ed 2d 396 (1982) (quoting *Gregoire v Biddle*, 177 F2d 579, 581 (CA 2, 1949)); accord *Jennings*, 446 Mich at 134 (quoting the Legislative determination that limiting liability makes EMS workers less reluctant to perform their jobs). With those Legislative goals in mind, the word "treatment" should not be read to exclude from MCL 333.20965(1)'s purview any of the emergency medical services the Legislature sought to encourage; rather, "treatment" must embrace as many of those services as the word's context and ordinary meaning allow, driving the patient in an ambulance included. See, e.g., MCL 333.20908(8) (defining "medical first responder" as an individual "who is licensed to provide medical first response life support … as a driver of an ambulance").

Next, consider the nature of EMS work. EMS personnel, like police officers, "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving[.]" See *Graham v Connor*, 490 US 386, 396-97; 109 S Ct 1865; 104 L Ed 2d 4513 (1989). The situation calls for a statute that is clear and predictable. Confining "treatment" to its medical sense, as Plaintiff urges, creates uncertainty. What is medical enough and what is not? When does

treatment turn from just treatment to medical treatment and back? When does treatment start and stop? Permitting those questions to exist will produce the chilling effect that the Legislature passed MCL 333.20965(1) to minimize; they might give pause to EMS personnel precisely when pause could mean the difference between life and death. When treatment is understood in its broad sense, however, the statute becomes more intelligible. Treatment is just the handling of or behavior toward the patient and whether the EMT's services are consistent with her license is the benchmark. An EMT can stay focused on doing her job without fear that her conduct will be scrutinized with the perfect clarity of hindsight.

To put this in perspective, an ambulance's core purpose is to start care at some scene and simultaneously move the patient to a hospital where more advanced or specialized care can be provided. Without a driver an ambulance is useless. And the driver must have the same mettle while driving as at any other time. Plaintiff's narrow interpretation of MCL 333.20965(1) would discourage people from putting an ambulance to its paramount use. What reasonable person would choose to become an ambulance driver, much less drive a patient whose life is on the line, when a simple mistake could expose her to massive personal liability? Only the most resolute (or careless) people would choose to become EMS workers if they knew with certainty that at some point they would have to drive an ambulance and be subject to a nebulous standard of reasonableness. That's the opposite of what the Legislature intended.

Section 20965(1)'s focus on the scope of the EMS license provides firmer ground. Regardless of the uncertain and rapidly evolving circumstances, an EMT

will know her qualifications beforehand and only needs to be concerned with acting consistent with those qualifications. She will not have to question whether particular acts could lead to liability because a court or jury, as a Monday morning quarterback, might find that they were not "treatment." That's good for EMS personnel. More people will be emboldened to serve as EMS personnel and produce more and better emergency care. That's good for Michigan residents. And courts applying MCL 333.20965(1) will only have to compare an EMT's conduct to an EMT's license or training, a relatively objective test that leaves less room for subjective nitpicking about what "treatment" is and facilitates more predictable and uniform decisions.[4] That's good for Michigan's judges and lawyers.

The Court of Appeals' decision to reject Plaintiff's narrow definition has support elsewhere in the EMSA too. Most notably, when the Legislature intended the word "treatment" to be limited to some form of "medical treatment," it said so. In MCL 333.20925, the Legislature authorized ambulances to provide emergency transport to a police dog "if the police dog is in need of emergency *medical treatment* and there are no other individuals who require transport or emergency assistance at that time." *Id.* (emphasis added). Similarly, MCL 333.20696 clarifies that the EMSA does not authorize "*medical treatment* for or transportation to a hospital of

[4] Indeed, the Legislature's amendments to the statute over time show a move to eliminate subjectivity and uncertainty. The former statute, MCL 338.1925, only limited liability if an EMT acted in "good faith" and the patient's life was "in immediate danger." Removing the "good faith" and "immediate danger" requirements no longer requires courts to delve into the EMT's subjective state of mind or the surrounding case-specific facts bearing on whether a danger was "immediate."

an individual who objects to *the* treatment or transportation."[5] *Id*. (emphasis added). The fact that the Legislature qualified the word "treatment" with the word "medical" in sections 20925 and 20969, but not in section 20695(1), is strong evidence that "treatment" in section 20965(1) is not limited to medical treatment or some other kind of treatment. See *South Dearborn Env Improvement Assoc, Inc v Dep't of Env Quality*, 502 Mich 349, 370; 917 NW2d 603 (2018). Rather, a broad meaning complies with the Legislature's command to read the Public Health Code liberally "for the protection of the health, safety and welfare of the people of this state." MCL 333.1111. The Court of Appeals decision was consistent with the ordinary meaning of "treatment," its placement and function in section 20965(1), and the Legislature's intent. There is no reason for this Court to disturb it.

II. THE COURT SHOULD NOT ENTERTAIN PLAINTIFF'S EFFORT TO READ NEW SUBSTANCE INTO MCL 333.20965(1) OR INDULGE ARGUMENTS ABOUT SUPPOSED CONFLICTS WITH OTHER LAWS.

A. Plaintiff's Flawed Reading of MCL 333.20965(1) would Add a New Substantive Element to the Statute that would Entirely Hamstring the Legislature's Goals.

This Court has long refused to read into a statute "a mandate that the legislature has not seen fit to incorporate." *Jones v Grand Ledge Pub Schs*, 349 Mich 1, 11; 84 NW2d 327 (1957). But that's exactly what Plaintiff is asking the Court to do.

---

[5] This Court explained in *Robinson v City of Lansing*, 486 Mich 1, 14-15; 782 NW2d 181 (2010), that the word "the" is a definite article that refers to a specific or particular noun. In the context of section 20969, "the treatment" therefore means "the medical treatment" referred to earlier in the same sentence. The context also means that the two uses of the word "treatment" in section 20969's second sentence also relate to the "medical treatment" from the first sentence.

Instead of simply checking whether the service an EMT provided was consistent with what the EMT's license allowed, as the statute's operative language requires, Plaintiff also wants courts to make after-the-fact calls on whether an EMT's conduct was *medical* treatment. Plaintiff thus points to the court of appeals' dubious decision in *Frost v United Ambulance Serv*, unpublished memorandum of the Court of Appeals, issued July 29, 1997 (Docket No 194723) (Exhibit C), which held section 20965(1) didn't apply to moving a patient in a wheelchair because it did not require "licensure or additional training []or call upon such specialized knowledge." *Id*. But, as noted above, MCL 333.20965(1) does not say that a particular act *must require* licensure or additional training; it applies to all acts or omissions that occur while providing services to a patient that are *merely consistent with* an EMT's licensure or additional training. And the word treatment, in its proper grammatical context, does not describe the EMT's acts or omissions. Thus, interpreting the word "treatment" to mean "conduct that requires licensure or training" or "direct application of medicine, therapy, surgery, etc." reads into the statute a mandate the legislature did not see fit to incorporate.

Not only that, Plaintiff's definition—direct application of "medicines, surgery, therapy, etc." (Pl's App Lv at 17)—turns a relatively objective test into a guessing game. Suppose an EMT has to find a patient's pulse to determine if blood is flowing to an extremity. That act might fit within Plaintiff's definition; it also might not. Should the EMT have to spend extra time double checking the pulse at the expense of the next critical task? Or what about moving a patient on a stretcher to load him into the ambulance, activity that Plaintiff concedes is "treatment"? (Pl's Supp Br at

21). How is transporting a patient on a stretcher any more "treatment" than transporting him in an ambulance? See *Lee*, *supra*, Slip Op at 2, 4 (Exhibit B). And does an EMT's initial assessment of a scene—a step that could dictate exactly what the EMT must do to serve the patient—count as the application of medicine, surgery or therapy? Does it fall within the realm of "etc."? Or is a mistake in the vital first step something that does not receive section 20965(1)'s protection? It's not unreasonable to foresee judges and juries asking these questions and coming to different conclusions. That would cause confusion across the state, something the Legislature sought to avoid when it passed the EMSA to uniformly regulate emergency medicals services. See *Malcolm*, 437 Mich at 142.

Finally, the associated-words cannon (*noscitur a sociis*) doesn't help Plaintiff. Plaintiff suggests that under the associated-words cannon "treatment" must mean "medical treatment" because MCL 333.20965(1) is a section in the Emergency Medical Services Act. That's not how the associated-words cannon works. The cannon holds that "[w]hen several nouns or verbs or adjectives or adverbs—any words—are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." *Reading Law*, *supra*, § 31, p 195. More precisely, "the terms *must be conjoined* in such a way as to indicate that they have some quality in common." *Id*. at 196 (emphasis added); see also *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521 533; 697 NW2d 895 (2005) (applying *noscitur a sociis* so that "words and clauses will not be divorced from those which precede and those which follow" and to give words in a list "related meaning"). Plaintiff therefore can't pluck a word from the

EMSA's title and a word from a particular section, put them together and say they're related under the associated-words cannon. Such words are out of context, not associated in it. Plaintiff, moreover, ignores the Legislature's explicit prohibition on using a "heading or title of an article … to construe the [Public Health Code] more broadly or narrowly than the text of the code sections would indicate[.]"[6] MCL 333.1113; see MCL 333.20901(2) (incorporating the Public Health Code's general principles of construction). Therefore, the fact that the word "medical" is included in the EMSA's title does not mean that the use of the word "treatment" in MCL 333.20965(1) means *medical* treatment.

In short, defining treatment as Plaintiff suggests raises more questions than it answers and would lead to inconsistent decisions. Those are not the conditions that encourage people to become EMS workers or perform emergency medical services without hesitation.

B. The Court of Appeals' Decision does not Create a Conflict with the Government Tort Liability Act or the Motor Vehicle Code.

But, Plaintiff argues, this conclusion creates disharmony between the EMSA, the Government Tort Liability Act ("GTLA") and the Motor Vehicle Code ("MVC") owner-liability statute. Not so. The GTLA, to be sure, allows the government to be sued for its employee's negligent operation of a motor vehicle ("motor-vehicle exception"). See MCL 691.1405. And the MVC's owner-liability statute makes a

[6] For this reason, if the Court chooses to grant Plaintiff's application it should overrule decisions like *Knight v Limbert*, 170 Mich App 410 (1988), which held, based on the title of the act, that MCL 333.20965(1) does not apply unless there is an emergency. Such holdings, as the Court of Appeals noted here, are inconsistent with the EMSA's definition of "patient" and MCL 333.20965(1)'s plain language.

vehicle owner vicariously liable for the negligent use of his vehicle. See MCL 257.401(1). But that doesn't mean that the EMSA can't still limit liability in cases where the negligence occurred in the course of providing emergency medical services.

For its part, the GTLA contemplates that other tort defenses will apply. See MCL 691.1412. This Court, moreover, explained in *Malcom v City of East Detroit*, 437 Mich at 142-48, how the EMSA, as the later enacted statute, could modify the GTLA to the extent the acts conflict. By the same reasoning, the EMSA can be read as an exception to the GTLA's motor-vehicle exception; a government entity can be held liable for negligent operation of a motor vehicle unless MCL 333.20965(1) applies.[7] The statutes are harmonious. *Omelenchuk v City of Warren*, 466 Mich 524, 531; 647 NW2d 493 (2002). Therefore, contrary to Plaintiff's belief, the EMSA's limited liability applies equally to government ambulance drivers and private ambulance drivers.

That's true of the MVC too. The owner of a motor vehicle is responsible for its negligent use under MCL 257.401(1) unless MCL 333.20965(1) applies. There is simply no conflict.[8]

---

[7] The Legislature's addition of MCL 333.20965(4) clarified that the EMSA does not reduce the immunity provided in the GTLA but did not modify *Malcom's* underlying reasoning or prevent the EMSA from enlarging immunity under the GTLA.

[8] It's worth noting too that the No-Fault Act, to some degree, limits liability under the GTLA and the MVC, by requiring the plaintiff in a third-party case to establish a threshold injury. See *Travelers Ins Co v U-Haul of Mich, Inc*, 235 Mich App 273, 286; 597 NW2d 235 (1999) (holding that the No-Fault Act limited the scope of the owner's liability act so that claims "remain viable where the plaintiff seeks noneconomic damages for personal injury rising to the requisite threshold").
Continued on next page.

This result, moreover, does not at all upset the balance the Legislature struck when it conditionally excused emergency vehicles from certain parts of the MVC in emergency situations. See, e.g., MCL 257.603(2)-(4) and MCL 257.632. By its own terms, MCL 333.20965(1) does not alter an ambulance driver's exposure to civil infractions or misdemeanors, which unlike the civil claims addressed in MCL 333.20965(1), "serve to vindicate the interests of the sovereign," not "right[] private wrongs." See *In re Bradley Estate*, 494 Mich 367, 410; 835 NW2d 545 (2013) (McCormack, J., dissenting). So the state's interest in protecting motorists can be vindicated through a civil infraction (or misdemeanor) at the same time the patient's interest in receiving emergency care is advanced by limiting tort liability to cases of gross negligence or willful misconduct. On top of that, as Defendant notes, patients can receive benefits under the No-Fault Act or damages in ordinary negligence claims against other at-fault drivers. (See Def's Supp Br at 25). Again, Plaintiff's perceived conflict is illusory.

At bottom, Plaintiff has not shown that the Court of Appeals erred or any sound reason to upend the Legislature's choice to limit liability broadly for EMS personnel while providing services to patients.

CONCLUSION

Michigan's residents count on emergency medical workers to give life-saving care in harrowing circumstances. The Legislature counted on MCL 333.20965(1) to

---

Continued from previous page.
Accepting Plaintiff's argument would mean that a plaintiff need not establish a threshold injury to bring a third-party claim against a motor-vehicle owner or the government.

increase the number of citizens willing to take on that task and to increase the amount of emergency care available to Michigan's residents. Those objectives should not play second fiddle to dictionary definitions that don't account for a word's context or purpose. Section 20965(1) should therefore have broad application to avoid harming the Legislature's reasons for passing it. For all of these reasons, the MDTC respectfully requests that the Court leave in place the Court of Appeals' decision.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, PLC

Dated: December 20, 2019

By: s/ Michael C. Simoni

Michael C. Simoni (P70042)
840 W. Long Lake Rd., Suite 150
Troy, MI 48098
Attorneys for Amicus Curiae
Michigan Defense Trial Counsel, Inc.

34790392.10\088888-03868

Exhibit A

STATE OF MICHIGAN

COURT OF APPEALS

JOHN DOE, Next Friend of JANE DOE, a minor,

Plaintiff-Appellee,

v

JOHN DOE I, HENRY FORD HOSPITAL and HENRY FORD HEALTH SYSTEM, INC.,

Defendants,

and

JOHN DOE II and SUPERIOR AMBULANCE SERVICE,

Defendants-Appellants.[1]

UNPUBLISHED
September 17, 2009

No. 285655
Wayne Circuit Court
LC No. 07-701308-NO

Before: O'Connell, P.J., and Talbot and Stephens, JJ.

PER CURIAM.

Defendants, John Doe II (O'Connell) and Superior Ambulance Services (Superior), appeal by leave granted the trial court's denial of their late motion to file a notice of nonparty at fault and partial denial of their motion for summary disposition. We affirm in part and reverse in part.

I. Factual and Procedural History

The facts are undisputed. Matt DeFillippo (John Doe I), an employee of defendant Superior Ambulance, sexually assaulted plaintiff's 14-year-old daughter, Jane Doe, in the back of an ambulance while she was being transported from Henry Ford Hospital to Harbor Oaks Hospital.

[1] We note that defendants John Doe I and John Doe II were emergency medical technicians employed by defendant Superior Ambulance Service and their identities are known. John Doe I is Matt DeFillippo and John Doe II is identified as Timothy O'Connell.

On July 25, 2006, plaintiff took Jane Doe to Henry Ford Hospital because she had attempted suicide. Jane Doe then was transferred to a psychiatric hospital located approximately 60 miles away. Henry Ford personnel summoned an ambulance to effectuate the transport. O'Connell (John Doe II) drove the ambulance, while DeFillippo (John Doe I) rode in the back with Jane Doe. Jane Doe, dressed in a hospital gown, was in a five-point psychiatric belt that she could not unhook. The ambulance was locked from the inside.

The drive took 53 minutes, with the ambulance leading the way and plaintiff following in his vehicle. During that time, O'Connell became suspicious that DeFillippo was sexually assaulting Jane Doe because DeFillippo had turned off the ambulance's interior lights and was in very close physical proximity to Jane Doe for an extended time period. O'Connell could see that DeFillippo's left arm was draped near Jane Doe's hips, but could not see into the back of the ambulance because the lights were off and the patient was facing backwards.

O'Connell sent a text message regarding DeFillippo's suspicious behavior to his former partner, who did not immediately respond. O'Connell then sent another text message to his partner, who advised him to contact his supervisor regarding his suspicions. O'Connell sent a text message to his supervisor, Jamie Jose, who advised him to get DeFillippo out of the back of the ambulance and to turn on the lights. Despite O'Connell's request, DeFillippo did not immediately come to the front of the ambulance to sit in the jump seat. When they arrived at the hospital, DeFillippo did not immediately open the ambulance doors, but was observed speaking to Jane Doe. O'Connell saw that Jane Doe's gown was not completely fastened in the back. O'Connell noted that Jane Doe's demeanor had changed indicating she appeared more introverted and did not make eye contact when they arrived at their destination.

As a result of O'Connell's suspicions, the Michigan State Police interviewed Jane Doe. Jane Doe stated that DeFillippo had appeared compassionate and stroked her shoulder underneath her hospital gown. He asked her if he could feel her breasts; she indicated that she did not care, so he felt her left breast underneath her gown. Jane Doe said that she was frightened and just let him touch her. DeFillippo then kissed her breast and mouth and digitally penetrated her vagina. DeFillippo told Jane Doe not to tell anyone because he could get fired and her father would be very upset. He gave her his telephone number and indicated that the next time they met, she should bring her girlfriend along. DeFillippo pleaded guilty to third-degree criminal sexual conduct and was incarcerated at the time this litigation was initiated.

Plaintiff filed suit against defendants in January of 2007, but did not serve DeFillippo, who remained in prison. Defendants filed a motion to dismiss DeFillippo from the action and for permission to file a late notice naming DeFillippo as a nonparty at fault. At the hearing, plaintiff's counsel admitted that DeFillippo was not served during the life of the summons. The court denied the motion as untimely filed. The trial court subsequently entered an order dismissing DeFillippo from the litigation.

Defendants also filed a motion seeking summary disposition. The trial court granted summary disposition in favor of defendants regarding plaintiff's claims based on the vicarious liability of Superior for DeFillippo's criminal actions and for John Doe's claim of intentional infliction of emotional distress. The trial court denied summary disposition regarding the remainder of plaintiff's claims. Defendants Superior and O'Connell filed an application for

leave to appeal, which was granted by this Court. *Doe v Doe I*, unpublished order of the Court of Appeals, entered October 23, 2008 (Docket No. 285655).

II. Standard of Review

This Court reviews issues pertaining to the construction and interpretation of court rules under a de novo standard. *Haliw v City of Sterling Heights*, 471 Mich 700, 704; 691 NW2d 753 (2005). We also review a trial court's decision regarding a motion for summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

III. Analysis

A. Nonparty at Fault

Defendants contend the trial court erred in ruling they waited too long to name DeFillippo as a nonparty at fault. We agree.

In accordance with Michigan's 1995 tort reform legislation, the state has adopted a "fair share liability" system, where each tortfeasor is responsible, according to his or her percentage of fault, for a portion of the total damages. See *Smiley v Corrigan*, 248 Mich App 51, 55; 638 NW2d 151 (2001). MCL 600.2957(1) provides that the trier of fact shall allocate the liability of each person "regardless of whether the person is, or could have been, named as a party to the action." A finding of fault does not subject a nonparty to liability in the action, but is used only to determine the fault of named parties. MCL 600.2957(3). Thus, in a tort action such as this one, fault must be allocated to each person who is at fault, regardless of whether that person is or could be a party to the action. MCL 600.2957; MCL 600.6304.

The court rule that requires a party to timely file a notice of nonparty fault, MCR 2.112(K), provides, in relevant part:

> The notice must be filed within 91 days after the party files its first responsive pleading. On motion, the court shall allow a later filing of the notice on a showing that the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier, provided that the late filing of the notice does not result in unfair prejudice to the opposing party. [MCR 2.112(K)(3)(c).]

The function of the court rule was discussed in this Court's ruling in *Veltman v Detroit Edison Co*, 261 Mich App 685, 695; 683 NW2d 707 (2004). Specifically:

> MCR 2.112(K) concerns the procedural implementation of the elimination of joint liability, the reapplication of several liability, and the allocation of fault to a nonparty as provided in MCL 600.2957 and MCL 600.6304. The purposes of the court rule are to provide notice that liability will be apportioned, provide notice of nonparties subject to allocated liability, and allow an amendment to add parties, thereby promoting judicial efficiency by having all liability issues decided in a single proceeding.

In addition, 1 Longhofer, *Michigan Court Rules Practice* (5th ed), § 2112.13, p 312, explains the purpose behind MCR 2.112(K) as follows:

> Subrule (K) is designed to protect the parties from undue surprise and unfair tactics. The notice requirements prevent a party from changing the entire focus of the litigation by introducing the alleged fault of a nonparty at a late stage in the litigation.

Plaintiff named John Doe II, whom the parties understood to be DeFillippo, as a defendant. However, plaintiff never served DeFillippo. If defendants had been reasonably diligent, they could have ascertained that DeFillippo was not served and, thus, not a party to the suit. As a result, defendants could have filed a timely notice of nonparty at fault. However, defendants contend that they had no reason to undertake such reasonable diligence, where plaintiff was aware of DeFillippo's identity and whereabouts, had named him as a party and made specific allegations against him in the complaint.

The purposes of Subrule K are not effectuated if defendants are precluded from filing a notice of nonparty at fault. Subrule (K) is designed to protect from undue surprise. In this case, plaintiff was fully aware of DeFillippo's identity. The notice requirements are intended to prevent a party from changing the entire focus of the litigation by untimely introduction of the alleged fault of a nonparty. In this situation, the main focus of the litigation remains DeFillippo's actions and the resulting fault.

Plaintiff argued in the trial court that he would be prejudiced by the addition of DeFillippo as a nonparty because DeFillippo would then have the right to re-depose numerous witnesses. However, plaintiff assumed this risk by failing to serve DeFillippo. In addition, plaintiff has failed to demonstrate a reasonable likelihood that any witnesses will actually be re-deposed, given DeFillippo's current status as a prison inmate and his presumed indigency.

While the facts in *Rodriguez v ASE Industries*, 275 Mich App 8; 738 NW2d 238 (2007) are not aligned with those in the instant case, we find its reasoning regarding the relationship between plaintiffs and nonparties at fault to be applicable. Specifically:

> A plaintiff certainly has strategic reasons not to afford the jury an opportunity to allocate fault to a particular nonparty. Any fault that the jury might allocate to a nonparty may be a portion of fault that the jury then does not allocate to an actual defendant, which then reduces the amount the plaintiff can recover from an actual defendant.
>
> * * *
>
> But we do not believe that plaintiff can create an appellate parachute for herself by omitting [defendant] from the allocation of fault because [he] had been dismissed, thus potentially increasing the amount of fault allocated to the remaining defendant . . . . [*Id.* at 21-22.]

Plaintiff's failure to include DeFillippo as a party likely will increase the amount of fault allocated to the remaining defendants, despite DeFillippo's unquestionable status as the principal

tortfeasor. Plaintiff elected not to serve DeFillippo and never dismissed him from the lawsuit. Under these factual circumstances, the trial court erred in denying defendants' motion.

B. Summary Disposition

Superior and O'Connell contend the trial court erred in denying their motion for summary disposition regarding plaintiff's claims asserting the existence of common law and statutory duties to protect and in failing to recognize the availability of immunity pursuant to the Emergency Medical Services Act (EMS Act), MCL 333.20965(1).

"'The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature.'" *Taylor v Currie*, 277 Mich App 85, 94; 743 NW2d 571 (2007) (citation omitted). "The first criterion in determining legislative intent is the specific language of the statute . . . . If the plain and ordinary meaning of the language is clear, judicial construction is neither necessary nor permitted . . . ." *Id.*

The EMS Act, MCL 333.20965(1), provides, in relevant part:

> Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of a medical first responder, emergency medical technician . . . that are consistent with the individual's licensure or additional training required by the medical control authority including, but not limited to, services described in subsection (2), or consistent with an approved procedure for that particular education program do not impose liability in the treatment of a patient on those individuals or any of the following persons . . . .

It is undisputed that Jane Doe was a "nonemergency patient," which is defined by MCL 333.20908(1) as:

> an individual who is transported by stretcher, isolette, cot, or litter but whose physical or mental condition is such that the individual may reasonably be suspected of not being in imminent danger of loss of life or of significant health impairment.

The gross negligence or willful misconduct standard of MCL 333.20965(1) applies only to the "acts or omissions" of an "emergency medical technician . . . in the *treatment* of a patient." (Emphasis added.) Because the statute does not define the term "treatment," we may look to the ordinary dictionary definition. In accordance with *Random House Webster's College Dictionary* (1997), treatment is defined as "the application of medicines, surgery, therapy, etc., in treating a disease or disorder." It is undisputed that the services being provided by defendants in this matter concerned merely the provision of transport and not medical treatment. As such, and in accordance with the plain statutory language, MCL 333.20965(1) is inapplicable to the circumstances of this case. Because we find that MCL 333.20965(1) is not applicable, we need not address defendants' additional assertions regarding the broader application of the statute.

In their complaint, plaintiffs claimed that O'Connell, and Superior as O'Connell's employer, breached both a statutory and a common law duty to protect Jane Doe. Superior and O'Connell contend that the trial court erred in denying their motion for summary disposition

because O'Connell had no duty to protect Jane Doe from DeFillippo's criminal act and cannot be held liable for allowing the assault to continue.

> Pursuant to the child protection law, MCL 722.623 provides, in relevant part:
>
> (1) An individual is required to report under this act as follows:
>
> (a) A physician, dentist, physician's assistant, registered dental hygienist, medical examiner, nurse, *person licensed to provide emergency medical care*, audiologist, psychologist, marriage and family therapist, licensed professional counselor, social worker, licensed master's social worker, licensed bachelor's social worker . . . school administrator, school counselor or teacher, law enforcement officer, member of the clergy, or regulated child care provider *who has reasonable cause to suspect child abuse or neglect shall make immediately, by telephone or otherwise, an oral report, or cause an oral report to be made, of the suspected child abuse or neglect to the department.* Within 72 hours after making the oral report, the reporting person shall file a written report as required in this act. If the reporting person is a member of the staff of a hospital, agency, or school, the reporting person shall notify the person in charge of the hospital, agency, or school of his or her finding and that the report has been made, and shall make a copy of the written report available to the person in charge. [Emphasis added.]

The term "child abuse" is defined in MCL 722.622(f) as "harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, a legal guardian, or any other person responsible for the child's health or welfare . . . ." The term "immediately" is defined by *Random House Webster's College Dictionary* (1997) as "without lapse of time; at once."

Because O'Connell was licensed to provide emergency medical care, MCL 722.623(1)(a) is applicable. The trial court did not err in denying summary disposition because a genuine issue of material fact existed regarding whether O'Connell breached his statutory reporting duty.

At common law, a person generally has no duty to aid or protect someone else from a third person's conduct. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988); *Marcelletti v Bathani*, 198 Mich App 655, 664; 500 NW2d 124 (1993). However, a duty may arise if there is a special relationship between the defendant and the victim or the person causing the injury. *Marcelletti, supra* at 664. Defendants do not challenge the trial court's determination regarding the existence of a special relationship in asserting that O'Connell acted reasonably and, therefore, cannot be held liable. However, this comprises a factual issue for a jury to determine. Because a genuine issue of material fact exists regarding whether O'Connell was negligent in failing to protect Jane Doe there is also a genuine issue of material fact regarding whether Superior could be liable for O'Connell's conduct as his employer under the respondeat superior theory. *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996). As a result, the trial court did not err in denying defendants' request for summary disposition on this claim.

Superior and O'Connell also maintain that the trial court erred when it denied their motion to dismiss plaintiff's negligent hiring and training allegations against Superior. On

appeal, the parties fail to address this claim specifically with regard to O'Connell. As such, we deem the issue with regard to this defendant is waived. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Plaintiff's allegation regarding Superior's hiring of DeFillippo is limited by the Supreme Court's holding in *Brown v Brown*, 478 Mich 545, 547-548; 739 NW2d 313 (2007). The Supreme Court held:

> where an employee has no prior criminal record or history of violent behavior indicating a propensity to rape, an employer is not liable solely on the basis of the employee's lewd comments for a rape perpetrated by that employee if those comments failed to convey an unmistakable, particularized threat of rape. [*Id*.]

In addition to the lack of foreseeability of the employee's future criminal act, the Supreme Court noted other considerations with respect to duty:

> The moral blame attached to the conduct in question, a rape, rests with the perpetrator . . . not with his employer. Also, there was a low degree of certainty of rape because there was not a "close" connection between [the employee's] statements and the resulting rape. And imposing a duty on [the employer] would not effectively further a policy of preventing future harm, and would impose an undue burden on [this employer] and all employers. [*Id.* at 556-557.]

Superior had no duty with respect to hiring DeFillippo or training others to prevent his engaging in a future sexual assault, because there has been no demonstration that such conduct was foreseeable when he was hired. DeFillippo claimed that he disclosed a past conviction for fraudulent use of a financial device on his application for employment with Superior. The Superior employee who hired DeFillippo stated that his criminal background check revealed no arrests or convictions. Even if this Court assumes that Superior had knowledge of DeFillippo's fraudulent use of a financial device, this criminal act did not serve to predict a propensity to commit criminal sexual conduct. Further, DeFillippo's coworker and supervisor stated that none of his behavior during the course of his employment with Superior suggested a propensity to commit a violent or sexual assault. Because DeFillippo's criminal sexual conduct was not foreseeable, Superior had no duty with respect to hiring DeFillippo and training other employees to prevent DeFillippo's criminal acts. As such, the trial court should have granted the motion for summary disposition regarding the claim that Superior was negligent in hiring and training DeFillippo.

Superior and O'Connell also contend that the trial court erred when it denied its motion to dismiss plaintiffs' negligent infliction of emotional distress allegations.

> A plaintiff may recover for negligent infliction of emotional distress where (1) the injury threatened or inflicted on the third person is a serious one, of a nature to cause severe mental disturbance to the plaintiff, (2) the shock results in actual physical harm, (3) the plaintiff is a member of the third person's immediate family, and (4) the plaintiff is present at the time of the accident or suffers shock "fairly contemporaneous" with the accident. [*Taylor v Kurapati*, 236 Mich App 315, 360; 600 NW2d 670 (1999).]

"These limitations insure against deceptive claims and restrict the cause of action to bystanders whom the tortfeasor could reasonably have foreseen might have suffered mental disturbance as a result of witnessing the accident." *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75, 81; 385 NW2d 732 (1986).

Plaintiff's claim is fatally flawed because he was not present to observe the criminal sexual conduct. Rather, he was driving in a separate vehicle behind the ambulance. Nevertheless, he claims that he suffered shock "fairly contemporaneous" with the accident when he learned of it two days later.

As discussed in *Gustafson v Faris*, 67 Mich App 363, 369; 241 NW2d 208 (1976), John Doe's delayed discovery of the assault of his daughter is "not materially different from the circumstances undergone by virtually all parents whose children have been injured in accidents which the parents did not witness." *Id.* Absent a genuine issue of material fact regarding whether John Doe suffered shock "fairly contemporaneous" to the accident, the trial court should have granted Superior and O'Connell's motion for summary disposition of the negligent infliction of emotional distress claim.

Reversed in part, affirmed in part and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot

Exhibit B

STATE OF MICHIGAN

COURT OF APPEALS

EDDIE LEE,

Plaintiff-Appellant,

v

DOWAGIAC VOLUNTEER FIRE DEPARTMENT AMBULANCE SERVICE, INC., and KATHY MCFADDEN,

Defendants-Appellees.

UNPUBLISHED
June 10, 2010

No. 289605
Cass Circuit Court
LC No. 08-000148-NO

Before: OWENS, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order, which granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). We affirm.

I. APPLICATION OF EMSA

Plaintiff first argues that the trial court's grant of summary disposition was improper, claiming that immunity under the emergency medical services act (EMSA), MCL 333.20901 *et seq.*, does not apply in this case, because defendants were merely transporting a patient, and not providing treatment for the patient at the time of injury. We review de novo a trial court's grant of summary disposition, *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999), and also review de novo the proper interpretation and application of a statute. *Ford Motor Co v Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006).

MCL 333.20965(1) provides in relevant part:

> Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of a medical first responder, emergency medical technician, emergency medical technician specialist, paramedic, medical director of a medical control authority or his or her designee, or, subject to subsection (5), an individual acting as a clinical preceptor of a department-approved education program sponsor while providing services to a patient outside a hospital, in a hospital before transferring patient care to hospital personnel, or in a clinical setting that are consistent with the individual's licensure or additional training required by the medical control authority including, but not limited to,

> services described in subsection (2), or consistent with an approved procedure for that particular education program do not impose liability in the treatment of a patient on those individuals or any of the following persons:
>
> ***
>
> (d) The life support agency[1] or an officer, member of the staff, or other employee of the life support agency.

Under MCL 333.20965(1), individuals are shielded from liability "in the treatment of a patient." The primary goal of statutory construction is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). The statute does not define the term "treatment"; thus, we look to the dictionary to discern the term's ordinary meaning. See *Haynes v Neshewat*, 477 Mich 29, 36; 729 NW2d 488 (2007). The relevant definition of "treatment" is "the application of medicines, surgery, therapy, etc., in treating a disease or disorder." *Random House Webster's College Dictionary* (1997).

The trial court essentially concluded that transportation and transfer of a patient in need of emergency medical services, such as plaintiff in this case, "is part and parcel" of the "treatment" of that patient which is shielded from liability in the EMSA immunity provision. On this record, we agree that the incident falls within the treatment of the plaintiff, where the emergency providers were called to plaintiff's home, assessed his situation and administered medical treatment to him at his residence, decided he should go to the hospital, moved him to an ambulance and continued to provide care en route to the hospital. This is not a case of merely transporting a patient from one location to another; rather, the emergency responders transported plaintiff to the hospital because of a complained of medical condition. Notably, the record reflects that defendant Kathy McFadden was licensed to provide advanced life support as a paramedic, and that she provided such treatment for plaintiff at the scene and en route to the hospital in this emergency situation. Thus, the immunity provided for pursuant to MCL 333.20965 is applicable in the instant case, except upon a showing of gross negligence or willful misconduct, because defendants were engaged "in the treatment of a patient" where they were "providing services to a patient outside a hospital . . . that are consistent with [their] licensure or additional training required by the medical control authority." The EMSA provided immunity to defendants for ordinary negligence. Plaintiff therefore had to demonstrate the existence of a question of material fact related to gross negligence in order to prevail. See *Costa v Community Medical Services*, 263 Mich App 572, 580; 689 NW2d 712 (2004), aff'd in part and remanded 475 Mich 403 (2006).

II. GROSS NEGLIGENCE

Plaintiff next asserts that a question of fact exists in this case as to whether defendants' conduct amounted to gross negligence. Under EMSA, "emergency medical technicians and

---

[1] MCL 333.20906(1) defines "life support agency" in part as "an ambulance operation."

paramedics are not liable for services they provide absent gross negligence or willful misconduct." MCL 333.20965. There is no record support that defendants' conduct constituted willful misconduct, which required a showing of intentional harm. *Jennings v Southwood*, 446 Mich 125, 142; 521 NW2d 230 (1994), superseded in part on other grounds by MCL 333.20965(2). Thus, we must decide whether factual questions exist regarding gross negligence. For claims implicating gross negligence, "[s]ummary disposition is appropriate only where reasonable minds could not have reached different conclusions with regard to whether the defendant's conduct amounted to gross negligence." *Haberl v Rose*, 225 Mich App 254, 265; 570 NW2d 664 (1997). Generally, once a standard of conduct is established, the reasonableness of conduct under that standard is a question for the factfinder. *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998) (quotation omitted). "However, if, on the basis of the evidence presented, reasonable minds could not differ, then the motion for summary disposition should be granted." *Id.* (quotation omitted).

The EMSA's "gross negligence" language requires evidence of "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Jennings*, 446 Mich at 136-137. Thus, "a plaintiff must adduce proof of conduct 'so reckless as to demonstrate a substantial lack of concern for whether an injury results.'" *Maiden v Rozwood*, 461 Mich 109, 123; 597 NW2d 817 (1999). Significantly, "the content or substance of the evidence proffered must be admissible in evidence." *Id.* "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Id.* at 122-123.

The admissible evidence and testimony in this case demonstrated that McFadden and Emergency Medical Technician (EMT) Sandra McGuire[2] could not get the ambulance cot into plaintiff's residence, but left it on the front porch while they assessed plaintiff inside. Next, they placed plaintiff onto the cot on the porch, and secured three straps over plaintiff's chest, hips, and legs, and raised the side rails. The cot was "a little bit less than halfway" raised in terms of its height. McFadden provided a plausible explanation at her deposition as to why the cot was set in such position. Next, she proceeded down the single irregularly sized step to the driveway at the "foot end" of the cot. The wheels of the foot end of the cot were on the driveway as McGuire moved onto the step. At this point, the cot began to tip or shift towards the residence. McFadden told McGuire to "hold on," but they could not return the cot to an upright position with plaintiff on it.

It is unclear why the cot tipped. Nevertheless, the evidence indicated that the emergency responders did not drop plaintiff or let him fall; rather, they lowered the cot to the ground sideways and plaintiff was released from the straps. There is no indication that plaintiff's weight, 268 pounds at the time of the incident, was the cause of the tipping. Further, there is no indication that the cot could not be used to transport a patient in the position described by McFadden. According to the cot's manual, even in its highest position, the cot can be used for patient transfer or cot rolling.

---

[2] The EMSA provides that an EMT provides basic life support, while a paramedic provides advanced life support. MCL 333.20904(7); MCL 333.20908(5).

This case is akin to *Costa*, 263 Mich App at 580, where plaintiff's allegations sounded only in ordinary negligence and did not allege the gross negligence needed to overcome EMSA immunity. Viewing the evidence in the light most favorable to plaintiff, we conclude that reasonable minds could not differ as to whether defendants engaged in conduct "so reckless as to demonstrate a substantial lack of concern for whether injury resulted." *Jennings*, 446 Mich at 136-137. Even if the emergency responders were negligent in conveying plaintiffs from the porch to the driveway, evidence of ordinary negligence does not create a question of fact regarding gross negligence. *Maiden*, 461 Mich at 122. The trial court properly granted summary disposition in favor of defendants.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Michael J. Talbot

Exhibit C

STATE OF MICHIGAN

COURT OF APPEALS

MILDRED FROST,

Plaintiff-Appellant,

v

UNITED AMBULANCE SERVICE,

Defendant-Appellee.

UNPUBLISHED
July 29, 1997

No. 194723
Wayne Circuit Court
LC No. 95-518326 NO

Before: Jansen, P.J., and Wahls and P.R. Joslyn*, JJ.

MEMORANDUM.

Plaintiff appeals by right summary disposition in favor of defendant on the basis of immunity provided by §20965 of the Public Health Code, MCL 333.29065; MSA 14.15(29065), and lack of proof of requisite gross negligence or willful misconduct as those terms were defined in *Jennings v City of Southwood*, 446 Mich 125; 521 NW2d 230 (1994). This case is being decided without oral argument pursuant to MCR 7.214(E).

Section 20965(1) grants immunity, *inter alia*, to medical first responders such as the paramedics employed by defendant in conjunction with its ambulance service, "while providing services to a patient outside a hospital . . . that are consistent with the individual's licensure or additional training required by the local medical control authority." Here, the actions of the defendant's agents giving rise to alleged tort liability involved allowing a patient in a wheelchair to fall out of the wheelchair while being maneuvered from the patient's home to the front porch of the home so the patient could be loaded onto a gurney and then placed in the ambulance for transport to a hospital for treatment of a suspected myocardial infarction. While the actions of the paramedics in evaluating the condition of the patient and the need for stabilizing treatments would certainly be based on licensure or additional training, the straightforward task of maneuvering a person in a wheelchair from one place to another without allowing the person to fall out of the chair has nothing to do with licensure or specialized training but is rather a question of ordinary negligence. *Fogel v Sinai Hospital of Detroit*, 2 Mich App 99; 138 NW2d 503 (1965); *Gold v Sinai Hospital of Detroit, Inc*, 5 Mich App 368; 146 NW2d 723 (1966). As such activities neither require licensure or additional training nor call upon such specialized knowledge, such

* Circuit judge, sitting on the Court of Appeals by assignment.

activities do not fall within the ambit of the immunity provided by the statute. Therefore, even assuming *arguendo* that the trial court correctly determined that on these facts reasonable minds could not differ as to whether gross negligence or willful misconduct was established, the statute is simply inapposite and summary disposition was improperly granted.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Myron H. Wahls
/s/ Patrick R. Joslyn